Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

January 1 to March 31, 2006

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Production Summary

- The active inventory totalled 5,340 (34% over the target of 4,000 cases).
- Incoming appeals numbered 1,163; of these, 978 were appeals from WSIB decisions and 185 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 913 new appeals and 188 reactivated appeals recorded in the fourth quarter of 2005.
  - In the 1st quarter of 2005 the Tribunal recorded 969 new appeals and 153 re-activations.
  - In 2005, the weekly average of hearing ready appellants was 65. For Q1 2006, the weekly average of hearing ready appellants is 72. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 1,147; this includes 437 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 710 after hearing dispositions; of the after hearing dispositions, 684 followed from Tribunal decisions.
- The inactive inventory increased by 22 cases to 4,306 (at the end of Q4-05, inactive inventory was 4284 cases).
- In Q1 2006, 83% of final decisions were released within 120 days. Overall in 2005, 81% of final decisions were released within 120 days.
- Due to a lack of adjudicative resources, the Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. This has also led to delays in the pre-hearing areas.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2006, the notice inventory included 1,486 dormant cases, the active inventory totaled 5,340 cases, and the inactive inventory totaled 4,306 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q4-2004	5190
Q1-2005	5156
Q2-2005	5351
Q3-2005	5380
Q4-2005	5291
Q1-2006	5340

B. Incoming Appeals

Period	Incoming Appeals
Q4-2004	1124
Q1-2005	1122
Q2-2005	1198
Q3-2005	1057
Q4-2005	1101
Q1-2006	1163

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q4-2004	1119	471	648
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1015	478	537
Q4-2005	1190	465	725
Q1-2006	1147	437	710

D. Inactive Inventory

Period	Inactive Inventory
Q4-2004	4141
Q1-2005	4189
Q2-2005	4242
Q3-2005	4235
Q4-2005	4284
Q1-2006	4306

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q4-2004	1531	-37
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

In December 2005, the Tribunal entered into an agreement with CanLII to post its decisions on their public web site (www.canlii.org). The CanLII site offers a free full text search of Tribunal decisions. A limited number of decisions are currently available.

A training day was held in February 2006. The topics included a medical-legal panel discussion on chronic pain and fibromyalgia, followed by a session relating to the critical evaluation of medical evidence.

Tribunal and WSIB staff arranged a meeting of the Quality Loop for early April 2006. The meeting focussed on updates. L. Smargiassi reviewed the Appeals Branch case management experience for 2005 and P. Gilkinson provided an overview of the Adjudication Support Group functions. The Tribunal advised that efforts continue to reduce duplicate requests for Board file update materials and provided an update regarding privacy breach experiences and process.

In April, Ian Strachan, Tribunal Chair, was a panel speaker at a dinner meeting jointly hosted by the OBA's Administrative Law Section and the Workers' Compensation Section. The topic for the Panel was "Taking the pulse of Ontario's Administrative Justice System". Also in April, Carole Prest, Counsel to the Chair, spoke at an Administrative Law continuing education session organized by the Canadian Institute. The topic of her presentation was "Rules, Policies and Guidelines".

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2006 are set out below. Only those judicial reviews where there was some activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

1. **Decisions Nos. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)**

   The Tribunal denied the worker's appeal for an increased future economic loss and non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review.

   Counsel for the worker amended the worker's judicial review application to add the employer as a party. The employer moved to quash the judicial review for delay. The motion was scheduled to be heard on May 9th in Ottawa.

2. **Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)**

   The Applicant worker had a back injury in 1979. From 1979 until 1990, a period of almost eleven years, there were no records of back complaints. In 1993 the worker alleged that his back pain was related to the 1979 accident. The Vice-Chair found the 1979 accident did not cause the symptoms in 1990 and denied entitlement for a back disability.

   Counsel for the worker served an application for judicial review. After a significant delay, in the final quarter of 2005 the Applicant served revised materials. At the end of the quarter the Tribunal filed its factum. The judicial review was scheduled to be heard in Sudbury on March 20, 2006. However, at the request of counsel for the worker the judicial review was adjourned. It is anticipated the judicial review will be rescheduled to be heard in the fall.

3. **Decisions Nos. 2454/03 (January 20, 2004) and 2454/03R (September 15, 2004)**

The Tribunal found that the Applicant's work did not play a significant role in the development of his bilateral carpal tunnel syndrome, and denied him entitlement for benefits. The Applicant commenced an application for judicial review.

Counsel for the worker, with the Tribunal's consent, adjourned the judicial review in order to commence an application for reconsideration. At the end of the quarter the Tribunal was waiting to receive the worker's reconsideration application.

Recent Decisions

Causation - Apportionment

Decision No. 1390/98 discussed whether it is appropriate to apportion benefits granted to a worker for a compensable disability. In doing so it reviewed Tribunal decisions and Board policy as well as *Athey v. Leonati* [1996] 3 S.C.R. 458 (S.C.C.)

The Panel interpreted *Athey* as standing for the principle that it is ultimately the responsibility of the adjudicator to determine the point at which a claimant is fully and fairly compensated for the consequences of an injury. If the evidence establishes that a determinable portion of a disability results from an intervening event, then the original injury ceases to be responsible for the additional disability. Before apportioning responsibility between two contributing injuries, the finder of fact must be persuaded that the two injuries are distinct injuring processes, with measurable consequences.

Once this determination is made then the Tribunal is to apportion responsibility between these two distinct injuries applying the following principles, as articulated in Board policy (OPM Documents # 03-04-04; #05-05-08 and #08-01-05):

- the severity of each of the accidents
- the medical significance of the initial compensable injury
- the extent to which the worker recovered from the effects of the compensable injury
- whether the worker's medical status changed subsequent to the second non-compensable injury
- whether the consequences of each injury are separately measurable

Earnings Basis-Seasonal Workers

Decision No. 599/04 provides a comprehensive review of Tribunal jurisprudence with respect to the provisions in sections 40(1) and (2) of the pre-1997 Workers' Compensation Act.

The Vice Chair concluded that the later decisions indicate a growing consensus with respect to how seasonal workers are to be treated for the purposes of the earnings basis calculation under this section. Where the earnings of seasonal workers have a demonstrated pattern of employment, it is appropriate to have regard to both sections 40(1)(a) and 40(1)(b) in determining the fairest calculation of the worker's earnings the fairest calculations. Also, there may be circumstances other than provided in Board policy where it may be appropriate to include EI benefits in the calculation of earnings.

The Vice Chair also agreed with other Tribunal decisions that concluded that UI/EI benefits may be included in the earnings basis of seasonal workers in order to obtain a fair calculation of a worker's actual earnings (see, for example *Decisions Nos. 417/99, 2531/00* and *48/03*).

The Vice Chair found that s. 40 (2) was not applicable in this case. Though the worker only worked for a short period of time before the accident, he had an established pattern of employment prior to the accident, which was subject to the terms and conditions of a collective agreement with employers in the shipping industry. His employment therefore could be characterized as casual in nature.

The decision also addressed the worker's submission that the Board did not have the authority to recalculate the worker's earnings basis. The Vice Chair, after an extensive review of cases on this point (such as, for example *Decisions Nos. 776/93* and *177/97*), concluded that the Board had authority under its reconsideration powers under the Act, to recalculate the earnings basis, even if this occurred after R2. Furthermore, this recalculation did not constitute a review of the FEL award after the final review. The Vice Chair pointed out that these reconsideration powers of the Board ensured that the underpinnings of a claim were correct, including the factual basis of the calculation of earnings.

Evidence – Hearsay- E-mails

Decision No. 47/06 looked at when hearsay evidence, which in this case were copies of e-mails between a temporary agency and a client employer, may be relied upon over oral testimony.

The Vice Chair reviewed Tribunal decisions, which have addressed when hearsay evidence may be relied upon over oral testimony, such as *Decision Nos. 307/90* (1991) 17 W.C.A.T.R. 127, which referred to *Pitts v. Ontario (Ministry of Community & Social Services, Director of Family Benefits Branch)* (1985) 51 Or (3d) 302; and *887/92*.

The Vice Chair pointed out that while the Act has since been amended after these decisions were released, in particular with respect to time limits, that this has not fundamentally changed the nature of the Tribunal's adjudication with respect to hearsay evidence.

The Vice Chair found that the Tribunal may rely upon hearsay evidence over testimony in a particular case but that the reasons for preferring the hearsay over the oral evidence must be made clear. In this case, the e-mails provided potentially important evidence, which could provide details of the circumstances as the existed at the relevant time. As hearsay evidence then, they are not to be completely disregarded but rather to be considered in terms of reliability and credibility.

May 2006